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19415—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES H. MARSHALL, ADMINISTRATOR OF THE ESTATE OF JOSEPHINE B. MARSHALL, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled cause on July 6, 1937, affirming the decision of the United States Board of Tax Appeals.

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 46–55) is not reported. The *per curiam* opinion of the Circuit Court of Appeals (R. 71) is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 6, 1937. (R. 71.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, should be construed to apply to transfers made prior to the dates of the passage of the amendments, and, if so applied, whether it violates the Constitution.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 9–11.

STATEMENT

The material facts as stipulated (R. 20–45) and as found by the Board of Tax Appeals (R. 46–50) are substantially as follows:

Josephine B. Marshall died, intestate, June 4, 1933, a citizen of the United States and a resident of New York. Respondent is the administrator of her estate. (R. 47.)

The decedent was the life beneficiary of certain trusts under the will of her husband, the late Charles H. Marshall, of New York City, who died in 1912. The income from these trusts in 1920, the

year in which she made the transfer hereinafter referred to, was approximately $17,500. Besides her interest in this trust fund she owned certain securities outright which had a value at that time of approximately $420,000. (R. 47.)

By an instrument executed November 15, 1920, in London, England (R. 25–32, Ex. A), the decedent transferred to her son, Charles H. Marshall (who, as administrator of her estate, is the respondent herein) certain cash, stocks, bonds and other securities listed in a schedule attached to the instrument. Shortly after the transfer all of the shares of stock and registered bonds included in the securities transferred which were then standing in the decedent's name were transferred to the son's name. (R. 47–48.)

On the date of the transfer, November 15, 1920, the decedent entered into another agreement with her son (R. 33–42, Ex. B), which—after reciting the fact of the first agreement, and "the understanding" of the parties that in the event of the son's death during his mother's lifetime the securities and cash described in the schedule, or securities and cash of equal value, should be reconveyed to her—provided as follows (R. 33–35):

> I. The party of the second part may retain the securities described in the annexed Schedule, or in his discretion, may sell the same, or any part thereof, from time to time and shall invest and reinvest the proceeds and the cash thereof in other securities as

nearly as possible equal in value to the cash and to the present fair market value of the securities described in the annexed Schedule, and shall pay over to the party of the first part such portion of the income from the said securities as she may from time to time request in writing.

II. The party of the second part, during the lifetime of the party of the first part, shall carry all of the securities and cash described in the annexed Schedule and any other securities in which the proceeds of the securities and the cash described in the annexed Schedule shall have been invested or reinvested, in a separate account to be known as "Charles H. Marshall, Special Account" or some name of a similar nature.

III. The party of the second part, by his last will and testament, shall bequeath to the party of the first part, provided she survive him, all of the securities constituting, at the date of his death, the above mentioned "Charles H. Marshall, Special Account."

IV. The party of the first part shall from time to time reimburse the party of the second part for the increased amount of any State and Federal income taxes which the party of the second part shall be required to pay by virtue of the conveyance to him of the securities and cash described in the annexed Schedule.

V. The party of the first part, in the event that she survive the party of the second part, shall pay to his executors, upon the transfer to her of the securities then constituting the

above mentioned "Charles H. Marshall, Special Account", the amount of any State and Federal inheritance taxes due by virtue of such transfer.

VI. This agreement shall be binding upon the heirs, executors, administrators and assigns of both parties hereto.

During the decedent's life the son, in accordance with paragraph I of the agreement, paid to the decedent or for her account such portions of the income derived from the Special Account as she requested. In accordanee with paragraph III he executed a will early in December, 1920, bequeathing to his mother the securities in the Special Account as of the date of his death, and directing that all inheritance taxes thereon should be deducted therefrom. This provision of his will was revoked after his mother's death in 1933. (R. 50.)

Prior to the transfer in 1920 the decedent included the income from the transferred securities in her return. Since the transfer the son has reported the income. (R. 50.)

The Commissioner included the value of the securities, $468,115.07, in the decedent's gross estate as property of which the decedent made a transfer intended to take effect in possession or enjoyment at or after her death, and determined a Federal estate tax of $40,858.34. (R. 46.) The Board of Tax Appeals reversed the Commissioner's determination (R. 56), and the Circuit Court of Appeals affirmed, *per curiam*, the Board's decision (R. 71).

SPECIFICATION OF ERRORS TO BE URGED

The Commissioner urges that the court below erred:

1. In holding and deciding that the transfer effected through the medium of the instruments of transfer aforesaid was not intended to take effect in possession or enjoyment at or after the decedent's death.

2. In not holding and deciding that the aforesaid disposition, effected through the medium of transfer aforesaid, was intended to take effect in possession or enjoyment at or after the decedent's death.

3. In affirming the decision of the Board of Tax Appeals that there is no deficiency in the estate tax, instead of a deficiency of $40,858.34, as set forth in the notice of deficiency.

REASONS FOR GRANTING THE WRIT

This case presents the question whether Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and Section 803 of the Revenue Act of 1932 (Appendix, *infra,* pp. 9, 10), should be construed to apply to transfers made prior to the dates of the passage of the amendments, and, if so applied, whether it violates the Constitution. The same question as to the construction and validity of these statutes is involved in *Thomas B. Hassett* v. *E. Sohier Welch,*

in which the Government has filed a petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit, No. 375, October Term, 1937.

The only difference in the facts in this case is that the transfer by the decedent was effected by two agreements executed the same day. The first purported to make an outright transfer of certain cash and securities by the decedent to her son. The second required that the securities be held in a separate fund; that so much of the income arising therefrom as the decedent should request should be paid to her during her lifetime; and that the son should bequeath to the decedent, provided she should survive him, all of the securities forming a part of the fund at his death.

We believe that the two agreements must be construed together—as they were by the Board of Tax Appeals, and presumably by the court below—and hence that there is no material distinction between the two cases on the facts. The court below apparently considered that there was none, for it decided the case, *per curiam,* upon the authority of the decisions of the Circuit Courts of Appeals in ***Welch*** v. ***Hassett***, 90 F. (2d) 833 (C. C. A. 1st), and ***Bullard*** v. ***Commissioner,*** 90 F. (2d) 144 (C. C. A. 7th), now pending before this Court on the Government's petition for a writ of certiorari, No. 349, October Term, 1937.

CONCLUSION

Wherefore, it is respectfully submitted that this petition should be granted for the reasons urged in the petition in *Thomas B. Hassett* v. *E. Sohier Welch, supra.*

STANLEY REED,
Solicitor General.

OCTOBER 1937.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) [As amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516.] To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.* (U. S. C., Title 26, Sec. 411.)

[The language in italics represents the new matter added by the 1931 Amendment.]

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and de-

scribed therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (U. S. C., Title 26, Sec. 411.)

* * * * *

Treasury Regulations 80 (1934 Ed.):

ART. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.* — Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See Section 506 of the Revenue Act of 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1937